# Supreme Court of the United States

## OCTOBER TERM, 1902.

*No. 105.*

CHARLES F. GALE, as Receiver of the Elmira National Bank, Plaintiff in Error,

*against*

THE CHASE NATIONAL BANK.

## REPLY BRIEF FOR PLAINTIFF IN ERROR.

The brief for the defendant in error makes certain observations concerning the facts of the case which perhaps call for a reply.

At page 5 it is said that the "defendant does not admit, either by pleading *or otherwise*, that the currency or the draft belonged to the Elmira bank." It made this admission when it took them on deposit to the credit of that bank. It did not allege in pleading that they did not belong to the Elmira bank. The currency is expressly stated by Bush to have belonged to the Elmira bank (Record, p. 94, foot); and Bush was defendant's witness. His deposition had indeed been taken at plaintiff's instance, but plaintiff did not care to affirm his credibility, and defendant, by in-

troducing his deposition, did so (29 Am. & Engl. Cycl. of Law, 1st ed., 812*n.*; 9 *id.*, 2d ed., 357*n.*; 21 L. R. A., 430; relying upon Cudworth *vs.* So. Car. Ins. Co., 4 Rich., 416; Richmond *vs.* Richmond, 10 Yerg., 343; Elliott *vs.* Schultz, 10 Humph., 234; Hatch *vs.* Brown, 63 Me., 410; Bloomington *vs.* Osterle, 139 Ill., 120). The evidence is uncontradicted and sustained by plaintiff's books, which charge the amount not to Bush, but to the defendant (Record, p. 95). The draft, when deposited, showed itself to be the Elmira bank's property upon its face, and was not entered in Bush's account with that bank. Moreover, the trial judge instructed the jury, as matter of fact, that both amounts were embezzled (pp. 105, 106). Had there been any defect in the proof, there would be a presumption in favor of the correctness of the statement in the absence of anything to the contrary. The presumption is always in favor of the rulings of the trial court (see Settlemeier *vs.* Sullivan, 97 U. S., 444, 449); and such presumptions may be referred to in proper cases by an appellant as well as by a respondent. (See Armstrong *vs.* Dubois, 90 N. Y., —; Wangler *vs.* Swift, *id.*, 38.) It must be assumed that there was evidence or an admission of the parties upon which the instruction was based, and in this connection it may be recalled that the Elmira bank's books were produced by plaintiff and used by defendant as well as plaintiff at the trial (Record, pp. 98–'9), and that, contrary to the usual custom, the rulings adverse to defendant, so far as they were considered to be important, have been incorporated in the record. (See pp. 50–'1, 60, 65, 67, 74, 79, 80.)

At page 12 of its brief defendant urges that the $15,012.50 item may actually have been charged to Bush's account and collected from him or paid by somebody else. Such a sug-

gestion at the trial could have been readily followed up, as the book lay open before the jury. For reasons above stated, it must be presumed, in support of the trial judge's action in directing a verdict for part of the amount, that it was admitted by the parties at the trial that there had been no payment of the check. The plaintiff having produced the check, which showed upon its own face that it was not a valid charge against the Elmira bank, and having shown that the defendant had made it the excuse of withholding $15,012.50 of that bank's moneys, the *onus* of showing that in some way the withholding could be defended was cast upon the other party; and no attempt was made to show this, although there was an attempt, which has been so far successful, to mitigate the damages.

At page 52 defendant criticises our failure to take the depositions of other directors besides Coy Kendall. The question was whether the directors had notice of Bush's signing drafts to his own order. The duty to examine drafts was deputed to Coy Kendall and two other directors. Coy Kendall was present at every meeting of this committee, and was able to swear that it never came to their attention. He was a disinterested and uncontradicted witness. His evidence was not improbable, nor self-apologetic, nor discredited by circumstances. It, therefore, must be accepted as true. There is no reason for supposing that any other director can have attempted to duplicate the work of this committee.

At page 53 defendant says that many of Bush's drafts may have been lost, as to whose existence we have no information. The trial judge did not think so (Record, p. 115). While some of his drafts had been lost, it appears that there

had been litigation in which they may have been used, and he looked up and produced, at defendant's request, the corresponding checks (p. 76). The vouchers later than November, 1892, were unimportant, because the bank's draft book showed all of them, and showed that he had obtained but two drafts of trivial amount during that period out of about 6,000 in all (p. 94). A great many drafts could not be found when plaintiff desired to produce, in the hurry of the trial, all those issued upon some particular day; but they had often been pulled over and disarranged, and there is no reason to suppose that they were not somewhere among the mass of 25,000 vouchers. (See pp. 86–94.)

Respectfully submitted, December 3, 1902.

EDWARD B. WHITNEY,
*Of Counsel for Plaintiff in Error.*

# Supreme Court of the United States,

No. 105.—October Term, 1902.

George C. Rankin, as Receiver of the Elmira National Bank, Plaintiff in Error,

*vs.*

The Chase National Bank.

**Petition for Rehearing.**

In error to the United States Circuit Court of Appeals for the Second Circuit.

The plaintiff in error, while successful in securing a reversal and direction for a new trial, nevertheless respectfully presents this petition for a rehearing. His excuse for doing so is that while the points decided by this Court in his favor entitle him to judgment for at least the sum of $7,012.50 and interest, he believes that an application of the same principle to the $8,000 item would entitle him to that item also; that he ventures to believe that certain considerations bearing upon that item may have been overlooked; that while in form he has obtained all he could ask, the opinion of the Court would restrict his opportunity for success upon this item in the courts below, and would be claimed to be "the law of the case" upon a second writ of error here; and that he desires to avoid further litigation in this case if possible.

In deciding the question raised as to the $7,000 draft, this Court says:

> "We are not, however, called upon to pass upon the rights of the parties upon the basis of what might have been done, but alone upon what was done. We may not indulge in conjecture, but must dispose of the case as depending upon the real, not the imaginary transaction."

Applying these propositions to the $8,000 currency we find the following facts relevant to the discussion: This currency was tendered by the Elmira Bank's cashier to the Chase Bank's Vice-President as part payment of a debt of his own, *and declined as such*. It was thereafter again tendered, this time as a deposit to the credit of the Elmira Bank in the latter's account, *and accepted as such*. It was accepted as a general deposit, like any other item. There was never a moment when it was in the Chase Bank's hands as the Chase Bank's property or as a part payment of the cashier's debt. Acceptance of the $8,000 as a payment by the cashier to the Chase Bank is "what might have been done." Acceptance of that sum as a sum for which the Chase Bank stood debtor to the Elmira Bank is "what was done." Both parties to the transaction treated it alike. The Elmira Bank charged it to the Chase Bank, just as the Chase Bank credited it to the Elmira Bank (Record, pp. 20, 96-7, 99).

Moreover, the defence as pleaded was based, not upon the theory that the $8,000 payment could be treated as a separate transaction, but upon the theory stated in the answer that it was specially deposited as an offset to the $15,012.50 certified check "as one transaction." This defence fails, for two reasons: first, that it was not proved, there being no such transaction recorded on the books of either bank, and there being no other amounts

credited to the Elmira Bank on the day in question which, together with this $8,000, would make an offset to the said certified check; and second, that the transaction thus admitted to be a unit was illegal, for, as stated by this court in its opinion—

> "The illegality of the check for $15,012.50 and the wrong resulting from charging it to the account of the Elmira Bank is not open to controversy."

It is respectfully submitted, therefore, that if the $8,000 be treated as a separate item, it is recoverable for the Elmira Bank because it is the property of that Bank, and was received by defendant as such; while, if it be treated as in the answer as part of a general transaction by which the $15,012.50 check was certified and charged against the Elmira Bank, the same result follows, because that transaction was without authority on the part of the cashier, and was illegal (the various grounds of illegality having been set forth in our brief at pp. 22-3, 36, 37, 42 top). The Chase Bank is not protected as a payee of currency because it never took the currency as payee, and because the rule of protection relates to a "payee of money in due course", (180 U. S., 293) and receipt of money in an illegal and wrongful transaction is not "in due course", but whatever is done in such a transaction is at one's peril.

If I am right in these views, it is respectfully submitted that a rehearing now will probably save litigation, as the Courts below will feel bound to follow all expressions in the opinion of this tribunal; and for this reason I respectfully certify that in my opinion this petition is well founded.

Respectfully submitted, March 11, 1903.

EDWARD B. WHITNEY,
Of Counsel for Plaintiff-in-Error.